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No. 85-1605

In the Supreme Court of the United States

OCTOBER TERM, 1985

JAMES ALVIN RHODES AND GARVEY MARTIN CHEEK,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners were properly convicted of engaging in a continuing criminal enterprise under 21 U.S.C. 848 when the evidence showed that they occupied managerial positions with respect to five or more people during the course of the criminal enterprise but not during each of the underlying felony drug violations.

2. Whether petitioners' sentences for terms of years were so disproportionate to their offenses as to violate the Eighth Amendment.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-59a) is reported at 779 F.2d 1019.

JURISDICTION

The judgment of the court of appeals was entered on December 26, 1985. A petition for rehearing was denied on January 29, 1986 (Pet. App. 60a). The petition for a writ of certiorari was filed on March 28, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of North Carolina, petitioners were convicted on one count of conspiracy to possess and distribute cocaine and marijuana, in violation of 21 U.S.C. 841(a)(1) and 846 (Count 1), two counts of possession of

more than 1000 pounds of marijuana with intent to distribute it, and two counts of distribution of more than 1000 pounds of marijuana, all in violation of 21 U.S.C. 841(a)(1) (Counts 4-7). Petitioner Cheek was also convicted on one count of possession of cocaine with intent to distribute it, and one count of distribution of cocaine, in violation of 21 U.S.C. 841(a)(1) (Counts 2 and 3), as well as three Travel Act violations (18 U.S.C. 1952) (Counts 8, 10, and 11). Both petitioners were also convicted on separate counts of engaging in a continuing criminal enterprise (CCE), in violation of 21 U.S.C. (& Supp. II) 848 (Counts 12 and 16). On the substantive counts, petitioner Cheek received a total sentence of 75 years' imprisonment, and petitioner Rhodes received a total sentence of 45 years' imprisonment. On the CCE counts, Cheek and Rhodes were sentenced to 75 years' and 50 years' imprisonment, respectively. The court of appeals affirmed in a lengthy opinion (Pet. App. 1a-59a).

The evidence adduced at trial, which is not in dispute, is summarized in the opinion of the court of appeals. The evidence showed that Cheek and Rhodes were involved in a series of drug transactions between October 1978 and the spring of 1980. In late 1978 Cheek unloaded 17,000 pounds of marijuana at a farm in Alexander County, North Carolina, which Rhodes had previously used for distributing marijuana. Rhodes and two other men worked together to sell a portion of the 17,000-pound load. Through one of his associates, Jeffrey VanMeter, Rhodes also bought a quantity of marijuana from Jorge and Fred Aragon in the fall of 1978. In early 1979, Rhodes met with the Aragon brothers to discuss the possibility of helping the Aragons purchase an airplane for future smuggling ventures by air instead of by sea. Rhodes subsequently received some marijuana from a successful airdrop the Aragons conducted in the spring of 1979. Pet. App. 13a-15a, 779 F.2d at 1022-1023.

In May or June of 1979, Rhodes obtained a load of marijuana from Fort Lauderdale. He sent several cars from North Wilkesboro to pick up the marijuana from two of his associates. Jeffrey VanMeter helped load the cars in Fort Lauderdale and then traveled to North Wilkesboro, where Rhodes gave him $600,000 to take back to the suppliers. A fourth person accompanied VanMeter back to Florida with the payment. The evidence showed that at least five other persons picked up carloads of marijuana in Florida for Rhodes in the summer of 1979. Pet. App. 15a-16a, 18a-19a, 779 F.2d at 1023.

In October 1979 Cheek arranged to purchase four kilograms of cocaine for $200,000. Cheek paid half the purchase price when he received the cocaine; he agreed to pay the balance to the supplier after he had sold the drugs. Together with his assistant, Rocky Townsend, Cheek drove with the cocaine from Florida to North Carolina, where he delivered the cocaine to another conspirator. Several weeks later, Cheek had Townsend deliver the balance of the original purchase price to the supplier at a motel in Charlotte, North Carolina. Pet. App. 6a-7a, 779 F.2d at 1021.

At the time of that cocaine transaction, Cheek and Rhodes had made arrangements to take part in a large marijuana importation, which was scheduled to take place around Thanksgiving of 1979. The Aragon brothers had agreed to obtain 5000 pounds of marijuana in Colombia, South America, and to transport it to southern Florida, where they would sell it to Cheek and Rhodes and another unnamed person. Cheek made arrangements to receive the marijuana from the offloaders and to transport it to a stash house for later distribution in North Carolina. He sent Townsend and two other associates to rent rooms at two motels in Homestead, Florida, where the marijuana would be received from the offloaders. As planned, the offloaders drove the marijuana from the coast to the motel rooms.

Rhodes then arranged for other drivers to take the marijuana to the stash house for unloading and weighing. Cheek and two other men weighed and numbered the bales of marijuana when they arrived at the stash house. Two of Rhodes' assistants then loaded a motor home with marijuana that the stash housecrew had processed. After all but some 1200 pounds of wet marijuana had been removed from the stash house for distribution, Cheek and two of the other conspirators traveled to Charlotte, North Carolina, and then to petitioner Rhodes' house in North Wilkesboro, where they met Rocky Townsend, who had driven from Florida with a load of the wet marijuana. Cheek and Jorge Aragon spread out the marijuana in Rhodes' garage to try to dry it out. Pet. App. 16a-17a, 779 F.2d at 1023. Aragon was still waiting for payment for the marijuana, so Cheek directed Townsend to drive to Cheek's house in Florida and pay Aragon $500,000 for the marijuana. Pet. App. 8a-10a, 779 F.2d at 1021-1022.

Shortly after the Thanksgiving 1979 venture, Jeffrey VanMeter also drove a separate load of 600 to 700 pounds of marijuana, which had been supplied by two of Rhodes' associates, from Florida to North Carolina. Rhodes paid VanMeter $1000 for transporting the load. Pet. App. 17a, 779 F.2d at 1023.

In the spring of 1980, Cheek traveled to Barranquilla, Colombia, with Jorge Aragon to arrange another marijuana transaction. They planned to airdrop 10,000 pounds of marijuana onto a yacht off the Florida Keys, unload it at a house in Islamorada in the Keys, and distribute it to Cheek, Rhodes, and other unnamed "people up north." Fred Aragon arranged for the Islamorada house and his brother Jorge stayed in the Florida Keys to monitor Coast Guard movement. Before the airdrop, Jorge Aragon contacted Cheek and told him he needed more money for the Islamorada operation. Cheek in turn contacted one of his

assistants and told him to send someone to Florida with more money. The next day, Cheek's wife arrived at Islamorada and gave Cheek $10,000. Cheek gave the money to Aragon and directed Rocky Townsend to help Aragon monitor Coast Guard activity. The marijuana was successfully airdropped and unloaded at the Islamorada house, where Cheek, Aragon, Townsend, and another person weighed the marijuana, separated the bales that were wet, and loaded the dry bales into cars. Cheek hired Townsend and three others to help transport the marijuana to North Carolina for distribution. In addition, Aragon called Rhodes when the load arrived and told him to send someone to help transport the marijuana. Shortly thereafter, four drivers arrived in Islamorada, where they picked up 1100 pounds of marijuana. Pet. App. 17a-18a, 779 F.2d at 1023. Aragon subsequently traveled to North Carolina to collect from Cheek and Rhodes for their respective purchases of 6500 and 1100 pounds of the Islamorada marijuana. Pet. App. 11a-13a, 779 F.2d at 1022.

ARGUMENT

1. Petitioners challenge (Pet. 9-21) the sufficiency of the evidence to support their convictions under 21 U.S.C. (& Supp. II) 848, arguing that the proper construction of that statute requires proof that the defendant occupied a supervisory position with respect to five or more persons during each of the violations constituting the continuing criminal enterprise, and not merely during the life of the enterprise as a whole. The court of appeals correctly rejected this argument. Such a construction is not required by the language of the statute, and no other court of appeals has adopted the construction urged by petitioners. Accordingly, no further review of this question is warranted.

Petitioners concede (Pet. 19) that their argument was previously rejected in *United States* v. *Smith*, 690 F.2d 748, 749-750 (9th Cir. 1982), cert. denied, 460 U.S. 1041 (1983).

Every other court of appeals that has considered the question has also decided that the five persons supervised need not have worked with the defendant at the same time, and that it is sufficient that he supervised at least five people over the life of the enterprise. *E.g., United States* v. *Becton,* 751 F.2d 250, 254-255 (8th Cir. 1984), cert. denied, No. 84-1622 (June 17, 1985); *United States* v. *Young,* 745 F.2d 733, 747 (2d Cir. 1984), cert. denied, No. 84-950 (Mar. 25, 1985); *United States* v. *Losada,* 674 F.2d 167, 173-174 (2d Cir.), cert. denied, 457 U.S. 1125 (1982); *United States* v. *Phillips,* 664 F.2d 971, 1013 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982); *United States* v. *Mannino,* 635 F.2d 110, 116 (2d Cir. 1980); *United States* v. *Bolts,* 558 F.2d 316, 320-321 (5th Cir.), cert. denied, 434 U.S. 930 (1977); *United States* v. *Sperling,* 506 F.2d 1323, 1344 (2d Cir. 1974), cert. denied, 420 U.S. 962 (1975).

Petitioners argue that these cases, other than *Smith,* hold only that the five persons need not be supervised *at the same moment* during the commission of one violation but may instead be supervised at different times during the course of a single violation. Petitioners argue that these cases are therefore consistent with their interpretation that the defendant must have supervised five people during each of the three required violations. *Smith,* however, explicitly rejected petitioners' claim precisely as they have framed it. See 690 F.2d at 749-750. Moreover, in *United States* v. *Mannino,* 635 F.2d at 116-117, the Second Circuit upheld a conviction under Section 848 even though, as the court's review of the evidence makes clear, the defendant did not supervise five or more people during each of the substantive offenses. It was enough that the defendant had at least five employees during the life of the drug business. And in both *United States* v. *Becton,* 751 F.2d at 255, and *United States* v. *Losada,* 674 F.2d at 174, the courts stated that the evidence showing the defendant's supervision of at least five

people during the course of the continuing criminal enterprise was sufficient to support convictions under Section 848.

This uniform interpretation of the statute is consistent with its language and purpose. Contrary to petitioners' view of the statute, there is no explicit language in Section 848 requiring that five or more people be supervised in *each* of the series of violations committed in the course of the criminal enterprise. The relevant portion of Section 848 reads as follows:

> [A] person is engaged in a continuing criminal enterprise if— * * *
>
> (2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—
>
> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management * * *.

Petitioners claim that the language of the statute indicates that Congress intended the supervisory requirement to apply to the "violations" instead of merely to the "series" of which each violation is a part (Pet. 11-12). Even accepting that contention, the phraseology used in the statute is a perfectly natural way for Congress to express a requirement that the violations, taken together, must be conducted in concert with five or more persons. If Congress had meant for the statute to require that each violation be undertaken in concert with five or more persons, it presumably would have included the word "each" in the statute.

The construction of the statute adopted by the court of appeals in this case is entirely consistent with the stated intention of Congress to reach drug "kingpins," *i.e.*, those persons who operate lucrative businesses manufacturing or selling illegal drugs. H.R. Rep. 91-1444, 91st Cong., 2d Sess. Pt. 1, at 10 (1970). The construction of the statute by the court of appeals does not, as petitioners suggest (Pet. 18-19), reach defendants who lead small, shifting groups that Congress could not have intended to brand as continuing criminal enterprises. Rather, by requiring substantial profits from the continuing criminal enterprise (21 U.S.C. 848(b)(2)(B)) in addition to the organization, supervision, or management of five or more other persons, Congress has ensured that only truly significant operations, such as the one in this case, will come within the reach of this statute.[1]

Petitioners' analogy to another statute, 18 U.S.C. 1955, does not further their argument. That statute makes it a federal offense to operate a large-scale gambling business that is illegal under state or local law, if the business is in

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[1]It is true, of course, that profitable drug businesses that employ only four people are excluded from the statute's coverage, whereas an operation with changing personnel totaling at least five is included. But it is not an unreasonable judgment that, once a certain number of people are involved under the leadership of one or more others, the criminal activity has become organized enough to require more severe measures regardless of whether the leader enlists his subordinates all at once or at different times and for different crimes. It is well settled that Congress is not compelled to regulate all aspects of an area equally or at one time (*New Orleans* v. *Dukes*, 427 U.S. 297, 305 (1976); *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970)). If anything, the "absurd results" that petitioners suggest (Pet. 18-19) show only that the continuing criminal enterprise statute may be underinclusive by not reaching the defendant who employs only four persons in repeated drug transactions. There is no reason to believe that, by leaving that person out of the statute's coverage, Congress meant also to exempt from coverage those who employ five, or ten, or 100 people in repeated drug transactions but never employ more than four in connection with any single violation.

continuous operation for at least 30 days. Petitioners point out (Pet. 15) that Section 1955 has been interpreted to require the participation of at least five people, albeit not the same five, at all times during the 30-day period. *E.g., United States* v. *Gresko,* 632 F.2d 1128, 1132-1133 (4th Cir. 1980); *United States* v. *Marrifield,* 515 F.2d 877, 882 (5th Cir.), cert. denied, 423 U.S. 1021 (1975). The wording of Section 1955, however, is significantly different from that of Section 848.

In Section 1955, an "illegal gambling business" is defined in part as one that "involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business" (18 U.S.C. 1955(b)(1)(ii)). Congress, unconcerned with minor gambling operations of only local interest, aimed its penalties at systematic enterprises that are so large that they require the involvement of at least five people at any one time for their operation. *United States* v. *Gresko,* 632 F.2d at 1132-1133. Everyone involved in the conduct of such a business, no matter how minor his role or how occasional his participation, is subject to prosecution under this provision. *Sanabria* v. *United States,* 437 U.S. 54, 70 n.26 (1978); *United States* v. *Greco,* 619 F.2d 635, 638-639 (7th Cir. 1980); *United States* v. *Avarello,* 592 F.2d 1339, 1349 (5th Cir.), cert. denied, 444 U.S. 844 (1979). It is the size and duration of the enterprise, not the individual's role, that matters.[2]

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[2]The operation of Section 1955 illustrates how it is possible to invoke seemingly anomalous comparisons to attack almost any interpretation of a statute that attempts to identify significant criminal activity by means of numerical tests. Under Section 1955, a person who participates in a minor way for just a few days in a gambling operation that lasts for 30 days may be convicted, whereas the leader of a gambling operation that lasts 29 days may not. That comparison does not suffice to override the intent of Congress in enacting Section 1955. Nor does petitioners' comparison between the leader of a small, changing group of drug offenders and a cohesive group of four large-scale narcotics operators suffice to undermine the settled interpretation of the continuing criminal enterprise statute.

The CCE statute, on the other hand, focuses on the role of the individual. It is aimed only at those drug "kingpins" who occupy a supervisory position in an illegal drug enterprise. See *Garrett* v. *United States,* No. 83-1842 (June 3, 1985), slip op. 8. The five-person requirement is not so much a way to distinguish one enterprise from another as a way to identify those individuals who exert the control and reap the large monetary rewards of the illicit business. The record in this case shows that petitioners, who enlisted the aid of numerous people in the multimillion-dollar importation and distribution of thousands of pounds of illegal drugs, are precisely the kind of persons the statute was designed to reach.

2. Petitioners also claim (Pet. 22-30) that the court of appeals did not engage in sufficiently "extensive" analysis of their claim that their sentences are so disproportionate to the CCE offense as to violate the Eighth Amendment. Petitioners offer virtually no argument that the court of appeals reached the incorrect result. Instead, they attack the way in which the court came to that result. Their argument is without merit.

This Court stated in *Solem* v. *Helm,* 463 U.S. 277 (1983), that a reviewing court should be guided by three objective criteria in determining whether a sentence is unconstitutionally disproportionate to the offense. The court should compare the gravity of the offense and the harshness of the penalty; it should examine the sentence at issue in view of the sentences imposed on other defendants in the same jurisdiction; and it should compare the sentence at issue with sentences imposed for the same crime in other jurisdictions (463 U.S. at 290-292).

The court of appeals made just such an analysis here and found that the sentences were not so disproportionate to the offense as to be unconstitutional (Pet. App. 38a-45a). Although petitioners contend (Pet. 24) that the court in this

case dealt only with the gravity of the offense and completely ignored the remaining factors, the court's opinion belies that claim. After noting the seriousness of the offenses, demonstrated by the repeated importations and distributions of cocaine and marijuana worth millions of dollars (Pet. App. 41a-42a), the court went on to a consideration of other sentences in similar cases. As noted by the court of appeals, the sentences imposed on petitioners are comparable to those imposed on many other CCE violators. The court's analysis on this point was succinct because it relied on the collection of similar CCE sentences found in *United States* v. *Darby,* 744 F.2d 1508, 1528-1529 (11th Cir. 1984), cert. denied, No. 84-1260 (May 13, 1985), rather than reciting all those sentences itself (Pet. App. 42a-43a).[3] Many of the sentences cited by the court in *Darby* were for life imprisonment without parole.[4]

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[3]The court in *Darby* recognized, 744 F.2d at 1528 n.15, that it is difficult to compare Section 848 with other federal crimes for which severe sentences are authorized, because the nature of the crimes is so different. For that reason, there is no merit to petitioners' complaint (Pet. 26) that the court of appeals in the present case erred by ignoring allegedly more serious federal offenses, such as assassination of the President, air piracy, and espionage, for which a life sentence without parole is not authorized. In addition, it is not necessarily true that a crime of violence or even espionage is always "more serious" than operating a continuing criminal enterprise. As suggested by Congress's determination that a life sentence without parole should be authorized for CCE but not for those other crimes (a quintessentially legislative judgment), a continuing criminal enterprise may have an effect on society that is at least as harmful as, if not more harmful than, an isolated act of violence or treachery.

[4]*United States* v. *Valenzuela,* 646 F.2d 352, 354 (9th Cir. 1980); *United States* v. *Sperling,* 560 F.2d 1050 (2d Cir. 1977); *United States* v. *Jeffers,* 532 F.2d 1101 (7th Cir. 1976), rev'd on other grounds, 432 U.S. 137 (1977). Additional cases involving life sentences under Section 848 are listed in our brief in opposition in *Milburn* v. *United States,* Nos. 85-69 and 85-5232. Both the opinion in *Darby* and our brief in opposition in *Milburn* also list a number of CCE sentences for terms of years comparable to those given petitioners. We are providing petitioners with a copy of our brief in opposition in *Milburn.*

The court of appeals did not explicitly address the third *Solem* factor, a comparison of the sentences with those imposed in other jurisdictions for similar crimes. But *Darby,* on which the court relied, noted that the unique nature of Section 848 and the special function it was intended to play in the comprehensive federal drug enforcement scheme make it difficult to compare with other state crimes, even those appearing to be equivalent (744 F.2d at 1529). The court in *Darby* held that, in view of Florida statutes authorizing severe sentences for narcotics offenses, there was "no serious disparity indicating that appellants' [60-year CCE] sentences are excessive" (744 F.2d at 1529).[5] The court below had no reason to reach a different conclusion or to elaborate on the *Darby* analysis. It correctly resolved petitioners' Eighth Amendment claim.

Petitioners ask this Court to grant certiorari because of certain language in the opinion of the court of appeals suggesting that an "extensive" analysis of this issue was not necessary. The court of appeals noted, as an alternative basis for its ruling on the Eighth Amendment issue, that "*Solem* requires an extensive proportionality analysis only in those cases involving life sentences without parole" (Pet. App. 37a) and that, "[u]nlike the court in *Darby,* we do not think that the sentences imposed in this case require an extended proportionality analysis" (*id.* at 40a). Whatever

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[5]Petitioners note (Pet. 26) that a North Carolina CCE statute authorizes life imprisonment. The severe sentence authorized in North Carolina tends to demonstrate the conformity of the federal CCE statute with the norms in other jurisdictions. And even if, as petitioners urge, the provision for parole in the North Carolina statute makes the federal statute materially more harsh, that is hardly dispositive. Neither *Solem* nor any other decision of this Court suggests that a sentence is unconstitutional because another jurisdiction punishes the same conduct less severely. Petitioners have no constitutional right to better treatment than other violators of federal law just because they live in North Carolina.

the merits of these observations, it is clear from the rest of the court's opinion that the court conducted an analysis that is fully consistent with *Solem*. Immediately after the language cited by petitioners, the court of appeals elaborated on the point in a way that makes clear its compliance with *Solem* (Pet. App. 40a-41a):

> [O]ur duty is to decide whether the sentences under review are within the constitutional lim its. * * * Such a review, as one court has noted, often requires at least a perfunctory *Solem* analysis. *See Moreno v. Estelle,* 717 F.2d 171, 180 & n. 10 (5th Cir. 1983). While we would not use the same adjective to describe the analysis because of its overtones, we think that court meant less than extended and are of opinion that in cases where an Eighth Amendment claim is made concerning the length of a sentence which may not be disposed of as so obviously within the prerogative of Congress and the district court to require no comment, that a simple matching of the facts of a particular case against the *Solem* principles will suffice without extended discussion. That is what we do here.

Moreover, as noted above, the court of appeals engaged in a fully adequate *Solem* analysis in the course of resolving the Eighth Amendment claim. The court either discussed itself, or relied explicitly or implicitly on the *Darby* court's discussion of, each *Solem* factor. Other than their incorrect assertion that the court ignored two of the *Solem* factors, petitioners do not suggest what the court should have done to make its analysis more "extensive." Any difference between the analysis in *Darby* and the analysis in this case, which relied on *Darby,* has more to do with how the courts of appeals labeled their own actions than with the substance of the decisions. In any case, *Solem* itself declares that "extended analysis" of "proportionality" claims will rarely be required (463 U.S. at 290 & n.16).

Thus, contrary to petitioners' assertion, the decision in the instant case does not conflict with *Darby* or with *United States* v. *Ortiz,* 742 F.2d 712 (2d Cir.), cert. denied, 469 U.S. 1075 (1984). Any disagreement as to the extent of the analysis required in each case is more semantic than substantive. In each case the court conducted an Eighth Amendment inquiry just as mandated by *Solem* v. *Helm, supra,* and in each case the court reached the same result.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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